

Doc. 95-92

RECEIVED

BEFORE THE

Federal Communications Commission

DEC 20 1989

WASHINGTON, D. C. 20554

Federal Communications Commission
Office of the Secretary

DOCKET FILE COPY ORIGINAL

In the Matter of)

REQUEST BY A. C. NIELSEN COMPANY)
FOR THE COMMISSION'S AUTHORIZATION)
FOR TELEVISION BROADCAST STATIONS)
TO TRANSMIT ENCODED INFORMATION)
ON LINE 22 OF THE ACTIVE PORTION)
OF THE TELEVISION VIDEO SIGNAL.)

DA 89-1060

To: The Commission

APPLICATION FOR REVIEW

Airtrax, by its undersigned attorney, hereby respectfully requests the Commission to review action taken by the Chief of the Mass Media Bureau (the "Chief") on November 22, 1989.

QUESTION PRESENTED FOR REVIEW

Whether the Chief erred in granting a conditional authorization to A. C. Nielsen Company ("Nielsen") that will enable television stations to transmit Nielsen codes on Line 22 of the active portion of the video signal transmitted by those stations, under circumstances that do not ensure that codes placed on Line 22 by other authorized parties will be protected from being overwritten by the Nielsen codes.

Commission consideration of this matter is warranted because the Chief's action involves (1) a question of law and policy which has not previously been resolved by the Commission, and (2) application by the Chief of a policy that should be overturned.

ARGUMENT

1. In 1986, the Commission's staff granted to Airtrax's predecessor an authorization in favor of those television stations wishing to do so, which authorization enables them to include in Line 22 of the active portion of their video signal transmissions certain commercial advertisement identification codes inserted by Airtrax. When detected by special decoders that are installed to monitor a television station's transmissions, the codes enable Airtrax to identify advertisements and to verify the extent to which the monitored station broadcast such advertisements in their entirety, and with all of their features (e.g., color content, stereo audio, etc.).

2. The 1986 authorization granted to Airtrax's predecessor followed similar authorizations granted by the Commission's staff in 1985 to TeleScan, Inc. and to Ad Audit, Inc. TeleScan, Inc. and Ad Audit, Inc. had specifically recited their need to place their codes inside the active video

portion of the television signal, since Line 20 of the vertical blanking interval (which would otherwise have been available for the placement of those codes) was being used by stations to transmit Nielsen program and source identification codes as part of Nielsen's Automated Measurement of Lineups ("AMOL") system.

3. Nielsen's AMOL system has functioned on Line 20 for many years. On July 19, 1989, by letter of its counsel to the Commission's staff, Nielsen requested an authorization that would permit participating television stations to place AMOL codes on Line 22 of their transmissions (the "Request"). Nielsen has explained that it intends to continue to use Line 20 for the placement of AMOL codes that identify television network "feeds" to network-affiliated stations. Nielsen wishes to use Line 22 for the placement of AMOL codes that identify syndicated television programs. Nielsen uses the codes to identify programs with particularity, so that a Nielsen decoder installed to monitor a television station's transmissions can verify that the monitored station broadcast all or a part of a given episode of a syndicated program. These program broadcast verification data are then combined by Nielsen with its television station viewership estimates in rendering Nielsen's compilation of ratings reports on the national audiences for such programs. Nielsen offers the only national ratings

reports for television audiences that are currently available to national television advertisers and their agencies.

4. Airtrax has expressed its concern that because national ratings reports are vital to the commercial operation of the television advertising industry, because Nielsen provides the only such reports, and because in compiling its reports Nielsen uses only AMOL data and refuses to accept program broadcast verification data from other parties, the industry simply must accommodate AMOL. As a consequence, there is little or no incentive on the part of the post-production houses that assemble and duplicate videotapes of syndicated programs to protect Airtrax codes on Line 22 of pre-recorded commercial advertisements from being overwritten on Line 22 by AMOL codes, which are typically placed along the entire length of the videotape after the Airtrax-encoded advertisements have been integrated into the tape at the appropriate places.

5. Airtrax strongly urged the Commission's staff not to grant Nielsen's Request until a means could be found of ensuring that the post-production houses will not cause Airtrax codes on Line 22 to be overwritten by AMOL codes. Airtrax pointed out that the 1985 authorizations were granted to TeleScan, Inc. and Ad Audit, Inc. in significant part precisely so that those parties could avoid having to compete with AMOL for the use of Line 20, given the futility of attempting to

compete with AMOL. Airtrax argued that it would be unfair to grant Nielsen an opportunity to expand its AMOL service to a second line of television video, if to do so would have the effect of extinguishing those parties that had sought and been granted "refuge" on Line 22 as a means of avoiding conflict with AMOL on Line 20.

6. In the pleadings that were submitted by Airtrax and Nielsen in this proceeding, there is a dispute over whether Airtrax codes on Line 22 would be likely to be overwritten by AMOL codes if Nielsen's Request were granted. Airtrax pointed out that the level of precision that would be necessary in order to avoid such overwriting cannot be expected from the equipment commonly used by post-production houses or from the operators of that equipment, in the circumstances that currently prevail in the post-production-house industry. Nielsen did not directly dispute Airtrax's assertion that it is unrealistic to expect an operator to be able to shut off the AMOL encoder on Line 22 precisely at the point in the videotape when an Airtrax-encoded segment is encountered, without overwriting at least the initial frames containing the Airtrax codes (and potentially much more). However, Nielsen suggested that technology is available that would enable encoding equipment to be modified in order to incorporate a function

that would automatically suspend the placement of AMOL codes on Line 22 whenever other codes are detected.^{1/}

7. The Chief granted Nielsen's Request, subject to certain conditions, by letter to Nielsen's counsel dated November 22, 1989. Those conditions include a May 1, 1990 expiration of the authorization, and a requirement that Nielsen's AMOL codes not adversely affect the codes of other authorized users of Line 22, including Airtrax. The Chief did not resolve the dispute between Airtrax and Nielsen concerning

^{1/} Nielsen's suggestion was set forth for the first time in its Reply Comments, which were filed at the close of the pleading cycle established by the Commission's staff. Therefore, Airtrax did not have an opportunity to respond to Nielsen's suggestion.

Nielsen's suggestion that technology exists to incorporate an automatic "pause" feature in encoding equipment was based upon a letter to Nielsen from Ronald G. Schlameuss, the President of Valley Stream Group, Ltd., which manufactures such equipment.

However, as is established in the subsequent exchange of correspondence between Mr. Schlameuss and Ken Patterson of Absolute Post, Inc. (copies of which are submitted in Appendix A hereto), it appears that Mr. Schlameuss's statement to Nielsen was based upon a fundamental misapprehension on his part that the AMOL codes would continue to be placed on Line 20. In fact, Mr. Schlameuss informed Mr. Patterson that the so-called "SID" encoders, as modified, could be expected to detect the existence of codes on Line 22 only "with some regularity." Letter of November 17, 1989 from Mr. Schlameuss to Mr. Patterson, a copy of which is included in Appendix A hereto. And, even that was projected by Mr. Schlameuss as no better than a "possibility" (emphasis in original). *Id.*

the feasibility of a non-interfering, shared use of Line 22 by AMOL codes and Airtrax codes. Although the Chief's letter acknowledged the "significant disagreement in the pleadings as to the practicality of ensuring the integrity of line 22 signals" outside of the portions of the program videotape that are to be encoded with AMOL codes, the Chief apparently decided that the conditions imposed upon Nielsen's authorization are sufficient to ensure that post-production houses will place AMOL codes on Line 22 only on those portions of a program videotape that Nielsen wishes to encode, without overwriting Airtrax codes on Line 22 in other portions of the tape.

8. Airtrax prays the Commission to vacate the Chief's action and to deny Nielsen's Request. The error in the Chief's approach lies in his assumption that the conditions imposed upon Nielsen's authorization are sufficient to protect Airtrax. The Chief has failed to consider the impact upon Airtrax of even a relatively limited number of instances in which Airtrax codes might be overwritten by AMOL codes. Airtrax is a fledgling company that is still in the process of attempting to educate and attract clients to its novel service. In its efforts to market a new and largely unfamiliar commercial-advertisement identification and verification service to national television advertisers and their agencies, Airtrax must depend heavily upon the reliability of its system to function as designed and marketed. In the absence of

contamination, Airtrax's system has performed to date with an extraordinarily high level of reliability in identifying encoded commercial advertisements and in verifying the presence of certain features in those advertisements as they were aired.

9. On the other hand, if Airtrax's system were to suffer contamination as the result of whole or partial overwriting of Airtrax codes by AMOL codes, Airtrax's reputation and that of its system would suffer. Given Airtrax's position as a "start-up" entrepreneur attempting to persuade advertisers and agencies to place their confidence in a new technology, the significance of even a limited number of instances of the overwriting of Airtrax codes by AMOL codes would be entirely out of proportion to the actual number of such instances. Should such overwriting occur, even sporadically,^{2/} the reputation of Airtrax's system would be fixed in the marketplace, and no amount of explanation concerning violations of the conditions imposed by the Chief upon Nielsen's authorization would alter the perception that the Airtrax system had failed to perform with the promised level of reliability. While Airtrax might have recourse under those circumstances to request the Chief to suspend Nielsen's authorization to use Line 22, that relief would be academic.

^{2/} The information set forth in Appendix A hereto, and discussed in note 1, *supra*, suggests that the incidence of overwriting of Airtrax codes by AMOL codes will be considerably more common than hypothesized herein.

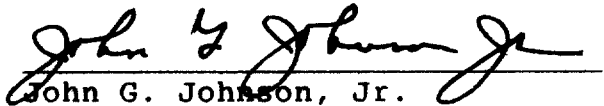
Once the advertisers and their agencies would have determined that the Airtrax system had not performed as designed and marketed, Airtrax would be finished as a viable business entity, and there would be no point in seeking to enforce thereafter the conditions imposed in the Chief's authorization to Nielsen.

WHEREFORE, Airtrax respectfully prays the Commission to vacate the Chief's letter of November 22, 1989 to Nielsen's counsel, and to deny Nielsen's July 19, 1989 Request.^{3/}

Respectfully submitted,

AIRTRAX

By:


John G. Johnson, Jr.
Its Attorney

Bryan, Cave, McPheeters & McRoberts
1015 Fifteenth Street, Northwest
Suite 1000
Washington, D. C. 20005-2689
Telephone: (202) 289-6100

December 20, 1989

0824J

^{3/} Simultaneously herewith under separate cover, Airtrax is filing with the Commission a Motion for a Stay of the effectiveness of the Chief's action of November 22, 1989.

Airtrax

DA 89-1060

**Application for Review
December 20, 1989**

APPENDIX A

Mr. Ronald G. Schlameuss,
President
Valley Stream Group, Ltd.
28 Fourth Street
Valley Stream, NY 11581



Mr. Schlameuss,

To recap our conversation of Monday, October 16, 1989:

1. I introduced myself as Ken Patterson, Chief Engineer at Absolute Post, Inc. the Burbank, California encode site for AirTrax, Inc.
2. We discussed the problem of using your encoding equipment to add Nielsen AMOL to a tape that contains segments with AirTrax encoding, LEAVING THOSE AIRTRAX ENCODED SEGMENTS COMPLETELY INTACT.
3. You said it should be no problem, as AMOL was on line 20 and AIRTRAX on line 22. I then informed you that AMOL was attempting to secure FCC approval to use line 22 as well.
4. You stated you felt your existing equipment could be modified to recognize AirTrax code by being able to read luminance at a repeatable, clockable level, but that your SID Encoder would not actually decode the AirTrax information, or recognize it as anything other than changing luminance levels. The SID Encoder would only allow the AMOL encoding to take place at points in the tape when the "changing luminance" levels WERE NOT detected on line 22 ("active video").

Again let me thank you for taking the time to speak with me regarding the AMOL/AirTrax encoding questions.

A handwritten signature in dark ink, appearing to read "Ken Patterson".

Ken Patterson
Chief Engineer

818/953-4820
2911 WEST OLIVE AVE.
BURBANK, CA 91505
FAX 818/845-9179

VALLEY STREAM GROUP, LTD.

28 FOURTH STREET
VALLEY STREAM, NY 11581
516-568-9449

Nov. 17 1989

Mr. Ken Patterson
Absolute Post, Inc.
2911 West Olive Ave
Burbank CA 91505

Mr. Patterson,

Other than our telephone conversation of Oct. 16, 1989, I am not aware of any phone calls made by you to our office.

I have received your FAX of Oct. 20, 1989 [copy attached], and it is essentially correct, with some clarifications to item four.

I believe that I stated that there was a *possibility* that the SGR-38 could be modified, via firmware, to enable the detection of a signal other than SID [on line 22] with some regularity [ie. repeatable bit rate and temporal position and constant luminance level], without actually decoding the signal, and to allow the signal to pass unencumbered.

I am curious to your as to your formality regarding this speculative discussion.

Yours truly,



Ronald G. Schlameuss
president

CERTIFICATE OF SERVICE

I, Lois L. Trader, a secretary in the law firm of Bryan, Cave, McPheeters & McRoberts, do hereby certify that I have on this twentieth day of December, 1989, caused copies of the foregoing APPLICATION FOR REVIEW to be sent by first-class United States mail, postage prepaid, to the following:

*The Honorable Alfred C. Sikes
Chairman
Federal Communications Commission
1919 M Street, Northwest
Room 814
Washington, D. C. 20554

*The Honorable James H. Quello
Member
Federal Communications Commission
1919 M Street, Northwest
Room 802
Washington, D. C. 20554

*The Honorable Sherrie P. Marshall
Member
Federal Communications Commission
1919 M Street, Northwest
Room 826
Washington, D. C. 20554

*The Honorable Andrew C. Barrett
Member
Federal Communications Commission
1919 M Street, Northwest
Room 844
Washington, D. C. 20554

*Roy J. Stewart, Esquire
Chief
Mass Media Bureau
Federal Communications Commission
1919 M Street, Northwest
Room 314
Washington, D. C. 20554

Grier C. Raclin, Esquire
Heron, Burchette, Ruckert & Rothwell
1025 Thomas Jefferson Street, Northwest
Suite 700
Post Office Box 96670
Washington, D. C. 20090
Counsel to A. C. Nielsen Company


Lois L. Trader

*/ Delivered by hand.